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Supreme Court of the United States

OCTOBER TERM, 1965.

No. [redacted] 218

HARTFORD ACCIDENT & INDEMNITY COMPANY
and
C. O. BRAND, INC.

Petitioners

versus

CONTINENTAL CASUALTY COMPANY

Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Of Counsel

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This case involves a subcontractor's claim against the surety on a statutory (Capehart Housing Act) dual-obligee payment bond. The Court of Appeals, without deciding respondent's defense of fraud, held that (i) the dual notices expressly required by the Capehart bond control over the less-stringent single-notice provision of the Miller Act, and (ii) the record shows indisputably that no such dual notices were ever given by petitioner-claimant.[1]

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[1] See Appendices to the petition for certiorari, p. 2. Although expressly finding that petitioner Brand, the subcontractor, and Hayes, the prime contractor, "had a secret oral agreement" which made the written subcontract between them "a sham to deceive their sureties as to the extent of their obligations and thereby protect their limited bonding position with their sureties", the Court of Appeals did not reach the fraud issue, but rested its decision on Brand's failure to give the dual notices required by the Capehart bond on which Brand sued. Appendices to the petition for certiorari, pp. 4-6.

In upholding the Capehart bond's dual-notice provision despite the Miller Act's different requirement, the Fifth Circuit reached the same result as did the only two other federal appellate decisions squarely in point, which decisions this Court refused to review.[2]

There is no contrary reported decision, on this issue, by any United States Court of Appeals or other federal court.[3]

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[2] *US for Miles Lumber Co. vs Harrison & Grimshaw Construction Co.*, 305 F2d 363 (CA 10-1962), *cert. den.*, 371 US 920 (1962); *Continental Casualty Company vs US for Robertson Lumber Co.*, 305 F2d 794 (CA 8-1962), *cert. den.*, 371 US 922 (1962), *reversing US for Robertson Lumber Co. vs Progressive Contractors Inc.*, 196 FS 171 (DC ND-1961). Moreover, as recently as 1965 this Court denied certiorari in a federal district court case squarely in point which the Eighth Circuit had affirmed per curiam. *US for Robertson Lumber Co. vs Cedric Sanders Co.*, 223 FS 435 (DC ND-1963), *aff'd.* as *US for Robertson Lumber Co. vs Continental Casualty Co.*, 340 F2d 958 (CA 8-1965), *reh. den., cert. den.*, 381 US 939 (1965). The only other reported federal district court decisions in point also all uphold the Capehart-bond dual-notice provision. *National State Bank of Newark vs Terminal Construction Corp.*, 217 FS 341, at 348-351, 354-355 (DC NJ-1963), *aff'd.* 328 F2d 315 (CA 3-1964); *US for Fine vs Travelers Indemnity Co.*, 215 FS 455, at 466 (WD Mo-1963); *US for J. W. Fogle vs Hal B. Hayes & Associates, Inc.*, 221 FS 260, at 261-263 (ND Cal-1963). And so do state appellate decisions that are right in point. *Allsop Lumber Company vs Continental Casualty Company*, 73 NM 64, 385 P2d 625 (1963); *B. C. Richter Contracting Co. vs Continental Casualty Co.*, 41 CalRptr 98 (CalApp 3-1964), *reh den.* Too, this Court has consistently denied certiorari with respect to all Capehart decisions, even on points other than notice. *Continental Casualty Co. vs Allsop Lumber Co.*, 336 F2d 445 (CA 8-1964), *reh. den., cert. den.*, 379 US 968 (1965); *Economy Forms Corporation vs Trinity Universal Insurance Co.*, 340 F2d 313 (CA 8-1965), *cert. den.*, 382 US 813 (1965); *National Union Fire Insurance Co. of Pittsburgh, Pa. vs D&L Construction Co.*, 353 F2d 169 (CA 8-1965), *reh. den., cert. den.*, ...US.... (No. 1149, May 16, 1966).

[3] Not one of the cases cited by petitioners holds that the Miller Act controls a Capehart bond's notice requirement. They all involved only other aspects of Capehart actions, such

Furthermore, this Court's denial of certiorari in each of the two earlier (*Robertson* and *Miles*) notice decisions by other Courts of Appeals, dating back to 1962, remains undisturbed by Congress.[4]

Since no ground exists for exercise of this Court's certiorari jurisdiction, it is respectfully submitted

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as jurisdiction, limitations, service of process and capacity to sue. But the Fifth Circuit herein expressly distinguished the notice question from the Capehart jurisdiction issue involved in the Fifth Circuit's own prior decisions. See Appendices to the petition for certiorari, pp. 2, 11, 13, 16-17.

[4] Note 2, above. This certainly imports Congressional approval. *Cf. United States vs Dupont & Co.*, 351 US 377, 386-387 (1956). Moreover, taking cognizance of all the mounting criticism of the Capehart program, Congress, since fiscal year 1963, has discontinued Capehart and returned to the traditional, cheaper and more satisfactory means of financing military housing construction by direct appropriations, for Congress provided, "That no more mortgages shall be insured under this section after October 1, 1962. . . ." 12 USC §1748b(a), as last amended on the point in 1961 by PL 87-57, 75 Stat. 96, H.R. 5000 (Military Construction Act of 1961), at Sec. 607(a), Title VI, which amends Sec. 803(a) of National Housing Act. Also PL 87-70, 75 Stat. 149 S. 1922 (Housing Act of 1961), at Sec. 604(c), Title VI, which likewise amends Sec. 217(d) [and hence Sec. 803(a)] of National Housing Act by imposing the same limitation. No later amendments or enactments have made any further extensions. See: 2 US Code Congressional & Administrative News (1961) 1923, 1965-1966; S. Rep. No. 200, 87th Cong., 1st Sess. 8-9; and H. Conf. Rep. No. 469, 87th Cong., 1st Sess. 27-28. See also: 108 Cong. Rec. 6691-6693, 11304-11305, 13626, 13700, 13707 (1962, 87th Cong., 2nd Sess.); H. Rep. No. 1558, 87th Cong., 2nd Sess. 45-47; and S. Rep. No. 1594, 87th Cong., 2nd Sess. 16-18; all concerning H. R. 11131 adopted as PL 87-554, 76 Stat. 223 (1962).

that certiorari should be denied.[5]

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[5] The only other complaint by petitioners is that the Court of Appeals "ignored" certain trial-court findings of mixed law and fact. Actually, however, the Court of Appeals expressly and correctly held that these findings were "clearly erroneous" and that, "The district court erred in finding that claimants in this case met the dual notice requirement of the Capehart bond." See Appendices to the petition for certiorari, pp. 2, 18-20.

CERTIFICATE

I certify that copies of respondent's foregoing brief in opposition were enclosed in an envelope addressed to David A. Binder, Esq., Messrs. Brown & Brown, 3810 Wilshire Boulevard, Los Angeles, California 90005, attorneys of record for petitioners, and placed in a United States mail box with first class air mail postage prepaid.

New Orleans, Louisiana, June 30, 1966.

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